# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| THE BAYBERRY GROUP, INC., d/b/a THE HOMESTEAD,<br><br>Plaintiff-Appellee,<br><br>v<br><br>RONALD J. NOVAK, CLASSIC BUILDING SUPPLY, INC., and STEWART G. NUNNELLEY d/b/a NUNNELLEY HEATING,<br><br>Defendants,<br><br>and<br><br>SCOTT EARL and STEVE SCHWARZ,<br><br>Defendants-Appellants. | UNPUBLISHED<br>March 22, 2007<br><br>No. 271463<br>Leelanau Circuit Court<br>LC No. 05-006906-CH |

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Defendants Scott Earl & Steve Schwarz, building inspectors employed by Leelanau County, appeal as of right the circuit court's denial under MCR 2.116(C)(10) of their motion for partial summary disposition of plaintiff's gross negligence claim, asserting they were entitled to governmental immunity as a matter of law. We affirm.

Plaintiff Bayberry Group, d/b/a The Homestead (a resort in Leelanau County), submitted a request for proposals (RFP) for gas fireplaces for its Fiddler's Pond Hotel, which RFP specified that the units would be "for commercial use in a sleeping area." Defendant Ronald Novak, owner of defendant Classic Building Supply, Inc. (CBS), a supplier of fireplaces, had previously worked with or for plaintiff on many contracts and subcontracts. Novak, who is not a licensed mechanical contractor, did preliminary research into gas fireplaces and reported back to Robert Kuras, plaintiff's president. Plaintiff ordered one B-vent fireplace unit from CBS, CBS installed it in one of plaintiff's Fiddler's Pond Hotel rooms in early March 2003, and Kuras "tested" the fireplace unit by placing inexpensive thermometers around the room. Kuras determined that guests would not be made uncomfortably warm by the fireplace. Later that month, plaintiff contracted with defendant CBS to remove all the wood-burning fireplaces at the Homestead's Fiddler's Pond Hotel and replace them with gas, B-vent fireplaces. CBS employee defendant

Stewart Nunnelley, a licensed HVAC contractor, filed the applications for mechanical permits and installed the remaining (approximately fifteen) B-vent gas fireplaces at plaintiff's Fiddler's Pond hotel.

The type of fireplace unit ordered and installed in plaintiff's Fiddler's Pond Hotel was a fuel-fired (propane) "B-Vent Decorative Gas Fireplace," manufactured by DESA, model P324. B-vent fireplaces have a glass door opening into the room in which they are installed, and draw combustion air from that room. Michigan's Building Code prohibits installation of such fireplaces in sleeping rooms: "fuel-fired appliances shall not obtain combustion air from . . . sleeping rooms." 2000 MRC M1701.4. The Building Code mandates that "Fuel burning appliances shall be vented to the outside in accordance with their listing and label and manufacturer's installation instructions. . . " 2000 MRC M1801.1.

In April 2003, defendant inspectors Earl and Schwarz, performed initial inspections of the B-vent fireplaces—at the "rough-in" stage. Schwarz initially failed units he inspected. However, at the end of the rough-in inspections, which were conducted over a three-day period, Earl and Schwarz approved all the units.

After Earl and Schwarz approved the B-vent fireplaces at the "rough-in" stage, Nunnelley went forward and completed installation of the B-vent fireplace units. Before defendant inspectors performed the final inspection, and before a certificate of occupancy was issued for the hotel rooms at issue, rooms were let to guests, and the B-vent fireplaces emitted smoke and soot into occupied hotel rooms.[1]

Defendants Earl and Schwarz conducted a final inspection in July 2004, and failed all the B-vent fireplaces for not being "sealed units." Plaintiff incurred approximately $260,000 in damages, including for having the fireplaces removed and replaced.

Plaintiff's original complaint named as defendants Novak, CBS and Nunnelley, and alleged professional malpractice as to installation against Nunnelley and CBS, among other things.[2] The original complaint did not name defendant inspectors Earl and Schwarz. The circuit court allowed defendants CBS, Novak and Nunnelley to file a late notice of non-party fault, which named inspectors Earl and Schwarz.

Plaintiff then filed an amended complaint, which included a count entitled "Negligent Approval of Nonconforming Fireplaces" against defendants Earl and Schwarz only.[3] The gross

---

[1] No one was hurt, but plaintiff placed yellow police tape over the fireplaces to prevent guests from using them. Plaintiff maintained it was unaware when it let the rooms that no certificate of occupancy had issued. In any event, the damages plaintiff claims are not related to personal injury, but rather, are economic, including that it incurred expenses removing and replacing the B-vent fireplaces.

[2] Plaintiff's original complaint named Classic Stove and Spa, Inc., but that defendant was dismissed after plaintiff filed its amended complaint without naming it as a defendant.

[3] Plaintiff's amended complaint also alleged breach of warranty of fitness for intended use (CBS
(continued…)

negligence count alleged that "Defendant-Inspectors Earl and Schwarz owed a duty to plaintiff only to:

> a. conduct a competent inspection of plaintiffs' commercial, hotel structure;
>
> b. approve the installation of such fireplaces at the rough inspection stage only if the fireplace units met all requirements of the 2000 Michigan Residential Code for use in Plaintiff's hotel rooms.

Plaintiff further alleged that defendants Earl and Schwarz breached their duty owed to plaintiff and were grossly negligent "by approving these fireplaces at the rough inspection stage even though such units were prohibited by the Michigan Residential Code for hotel rooms and only direct vent units were permitted," and proximately caused plaintiff's damages.

The parties filed cross-motions for summary disposition.[4] Counsel for defendant inspectors, counsel for defendants Nunnelley, Novak and CBS, and counsel for plaintiff, argued at the hearing, at which the circuit court stated its opinion on the record and denied both motions, noting:

> . . . the claims against the county are legally weak, but not at the point where they can be resolved—the Court believes—as a matter of law. Clearly *if there is any shared negligence* – and let's assume for the moment that these damages can be bifurcated at the point of rough inspection. There was a loss occasioned up to that point, relatively minimal. And a more significant loss occasioned after that point that could have been avoided if these units had been disapproved. Let's assume we can bifurcate damages at that point. If there is any involvement, shared involvement in fault *after the rough-in* inspection, if Mr. Nunely [sic] put his arm around the inspector and assurd [sic] him everything would be good, the requirement that a county building inspector be the proximate cause, could not be met. The negligence would be shared, which means the county would not be responsible, and it would all fall on the general contractor, the mechanical contractor, perhaps the building company or supplier as well.
>
> With regard to the front end of this, it does seem to the Court that a competent mechanical contractor should have raised that these units couldn't work in this installation. And if he simply missed that when he looked at the units requested and the plans, at some point that first unit shows up on the construction site and

(…continued)

only); professional malpractice as to recommendation (CBS and Novak); professional malpractice as to installation (CBS and Nunnelley); and negligent hiring, retention and supervision [for subcontracting to Nunnelley] (CBS and Novak).

[4] Defendants' motion was brought under MCR 2.116(C)(7), (8) and (10), and plaintiff's motion for partial summary disposition was brought under MCR 2.116(C)(10), and was relegated to the gross negligence count (Count V), and to liability only of defendants Earl and Schwarz.

Several motions for summary disposition were denied before the cross-motions at issue here were filed.

begins to be framed in. And whether it's the journeymen working on the project, whether it's a master mechanical contractor, whether it's the owner of the business, it defies imagination that someone could get to the point of actually completing the rough-in on one of these things and not realize it can't work in this particular installation.

So there would certainly be argument that even if there is gross negligence on behalf of the county from the rough-in forward, that the proximate cause was the actual approval for purchase of these units or the acceptance of the contract by the mechanical contractor and not saying at that point I'm happy to do the work, my bid doesn't change based on the unit, but you got to use a different unit, I can't instal [sic] these. And I can see—foresee the Court of Appeals saying that the proximate cause was – was right at the point where competent licensed people that ought to know better--and owners typically aren't that person –where that decision should have been made as rejecting these. At this particular point the Court doesn't feel it's in a position where it can say as a matter of law where that line has to be drawn, but I have some very strong suspicions that the proximate cause may well turn out to be the fault of the mechanical contractor in agreeing to even attempt to instal [sic] these.

But I will not say today as a matter of law that the rough-in approval of –knowing rough-in approval of improper fireplaces, the final installation of which could cause death or serious injury cannot amount to gross negligence. If the inspector knows that they're wrong, knows that death or serious injury can result from installing them and knowingly approves them anyway, certainly the Court believes those are facts thata [sic] jury could find to be -- a reasonably honest jury could find to be gross negligence. So at this point the Court feels constrained to deny all of the motions for summary disposition, both Plaintiff's and Defendant's [sic], because there are questions of fact regarding the gross negligence. . . .

[Emphasis added.]

Defendants' appeal ensued.

We note preliminarily that plaintiff clearly articulates for the first time on appeal a claim that defendants were grossly negligent at the permitting stage, i.e., at the point that mechanical permits were issued for installation of the B-vent fireplaces. This claim was not clearly asserted at the trial level, and we do not address it; we affirm the denial of summary disposition without regard to this claim.[5]

[5] If plaintiff seeks to pursue this claim on remand, leave to amend should be sought.

A

The circuit court denied defendant inspectors' motion under MCR 2.116(C)(10), a determination this Court reviews de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden, supra* at 120. All documentary evidence submitted is viewed in the light most favorable to the non-movant. If no genuine issue of fact exists, summary disposition is properly granted. *Id.*

The applicability of governmental immunity is a question of law this Court reviews de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). MCL 691.1407(2) and (7) address governmental immunity from tort liability, providing in pertinent part:

> (2) [E]ach . . . employee of a governmental agency . . . is immune from tort liability for . . . damage to property caused by the . . . employee . . . while in the course of employment . . . *if all of the following are met*:
>
> (a) The . . . employee . . . is acting or reasonably believes he . . . is acting within the scope of his . . . authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage. [Emphasis added.]
>
> * * *
>
> (7) As used in this section:
>
> (a) "Gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

To satisfy the causation requirement, defendant inspectors' conduct must be "the one most immediate, efficient, and direct cause" of plaintiff's damages. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

B

Defendants maintain they owed plaintiff no duty, citing only unpublished authority to support their position. Unpublished decisions are not precedentially binding. MCR 7.215(C)(1).

Plaintiff cites *Rakowski v Sarb*, 269 Mich App 619; 713 NW2d 787 (2006), in support of its argument that defendant inspectors did owe plaintiff a duty. In *Rakowski, supra*, this Court addressed an issue of first impression: "Whether a municipal building inspector owes a duty of care under common-law negligence to protect a homeowner's invitee from personal injury sustained by the invitee because of an allegedly defective structure inspected and approved by the building inspector." This Court ultimately concluded no duty was owed based on the facts presented. However, we conclude that the facts in the instant case are distinguishable from *Rakowski*, and support imposition of a duty.

The plaintiff in *Rakowski*, Marjorie Rakowski, sued the defendant building inspector after she was injured on the handicapped ramp at her parents' home when the railing gave way. Rakowski thus had third-party status vis a vis the defendant inspector. This Court noted that the plaintiff was a mere invitee on the day of the accident, that the accident occurred more than six months after the defendant inspector's inspection, and that the plaintiff neither owned nor lived in the house at which the ramp was built. 269 Mich App at 630.

In contrast, in the instant case, as alleged in plaintiff's complaint and supported by documentary evidence, plaintiff had personal contact with defendant inspectors and relied on them in approving the fireplaces at the rough-in inspection. Defendant inspectors conducted the rough-in inspections over three days at plaintiff's hotel, had direct contact with Nunnelley, and plaintiff paid defendant inspectors for their services and relied to its detriment on their approval of the fireplaces at the rough inspection stage, after which plaintiff went forward and completed the installations. A reasonable jury could conclude that defendant Nunnelley would not have continued the installation of the B-vent fireplaces had defendant inspectors issued a stop work order of the non-code compliant fireplaces or failed them at the rough-in inspection.

The *Rakowski* Court also noted that the lack of foreseeability of injury to a third party supported its finding that the defendant inspector did not owe a duty to the plaintiff. In contrast, in the instant case, defendant inspectors Earl and Schwarz could foresee that plaintiff would rely on their decision to approve the non-code compliant B-vent fireplaces at the rough-in stage, and thus allow their contractors to continue and complete installing the B-vent fireplaces.

Given the circumstances presented in the instant case, and that the facts are distinguishable from the facts in *Rakowski, supra,* we conclude that defendant inspectors owed plaintiff a duty at the rough-in inspection to approve only fireplaces that were code-compliant.

C

The remaining question is whether reasonable minds could differ regarding whether defendants' conduct in approving the B-vent fireplaces at the rough-in inspection was grossly negligent and whether that conduct was the proximate cause of plaintiff's alleged damages. The circuit court concluded there was a genuine issue regarding gross negligence, MCL 691.1407(2)(c). We agree.

We conclude that viewed in the light most favorable to the nonmoving party (plaintiff), this case involves the conduct of building inspectors in approving an inspection, where the inspectors knew the inspection should have failed due to a code violation based on an improper (and unsafe) product (not poor workmanship), and where the inspectors admit the result of approval could result in serious injury or death, and where the inspectors knew of no way to cure the defect absent complete removal and replacement of the product. No published (or unpublished) decision has addressed whether this type of conduct can constitute gross negligence as defined under MCL 691.1407(7).

The Michigan Residential Code, G2406.2 (303.3), prohibits the placement of B-vent fireplaces in sleeping areas:

G2406.2 (303.3) Prohibited locations. Fuel-fired appliances shall not be located

in, or obtain combustion air from, any of the following rooms or spaces:

1. Sleeping rooms.

When defendant inspectors ultimately failed the B-vent units at the final inspection, they cited this MRC provision.

Defendant inspector Schwarz testified on deposition that the Michigan Residential Code requires fireplaces for use in a sleeping area be sealed or direct vented [i.e., direct vented to the outside, whether through a roof or wall]. Schwartz testified that the B-vent fireplace units at issue here are neither sealed units nor direct-vented units. Schwarz testified that it would have been visually apparent at the rough inspection that the fireplace units were B-vent units. He testified that he did not know whether a B-vent unit could be sealed, and did not attempt to determine if a method existed to convert B-vent units into sealed units, but rather, relied on Nunnelley's assurance that the fireplaces would be sealed when completed. Defendant inspector Schwarz also testified that he did not ask Nunnelley how Nunnelley proposed to seal the B-vent fireplaces, that he (Schwarz) did not know whether it was possible to seal B-vent units, and that he relied on Nunnelley's assurance that such could be done.

Nunnelley's account sharply differs. In a signed affidavit, Nunnelley, a licensed HVAC contractor, denied telling defendant inspectors that the fireplace units would be sealed by the time they were completed.[6] In its totality, Nunnelley's affidavit states:

> 1. I am one of the named defendants in the above-entitled lawsuit. I am of suitable age, discretion and competence to testify accurately to the facts contained herein.
>
> 2. I have testified in this matter, by way of a discovery deposition, on November 1, 2005.
>
> 3. During my deposition, I testified as to the contents of the communications I had with Scott Earl and Steve Schwarz with regard to their rough-in inspections.
>
> 4. I never said to either Scott Earl or Steve Schwarz that the fireplaces they inspected at rough-in would be sealed units or direct vent units by the time the project was completed.
>
> 5. Neither Scott Earl nor Steve Schwarz told me they were approving the rough-in inspection conditionally.
>
> 6. At no time during the rough-in inspection did either Scott Earl or Steve

[6] Counsel for defendants Nunnelley, Novak and CBS, filed a response in opposition to defendant Earl and Schwarz's cross-motion for summary disposition, in support of which he submitted Nunnelley's affidavit. Nunnelley's affidavit was discussed at the hearing on the motions at issue in this appeal.

> Schwarz indicate to me that they were failing the inspection. They did not tell me there was a concern about installing the B-vent fireplaces. They did not tell me that B-vent fireplaces were in violation of the applicable building code.

Nunnelley testified on deposition that because defendants approved the fireplaces at the rough-in inspection, "we just kept working."

Additionally, Nunnelley testified that he had no input into the type of fireplace chosen (B-vent) and that he did not believe he had ever seen the RFP plaintiff issued regarding the fireplaces. Nunnelley testified that he did not check the Michigan Residential Code or any local code before installing the B-vent fireplaces, as recommended in the manufacturer's (DESA) installation manual. When asked why he did not consult the MRC, he answered "Because generally we just get the unit and install them [sic]. If it's a B-vent unit, we install it with B-vent pipe." When asked whether he was aware that only a direct-vent unit should go into a hotel room that gets its combustion air from a hotel room, Nunnelley testified that "it didn't enter into my head at the time." He also testified that he did not know of any way to fix B-vent fireplaces so they comply with the MRC, short of tearing them out and replacing them.

D

We agree with the circuit court that a reasonable jury could conclude that defendants' conduct in approving the Code-violating B-vent fireplaces at the rough-in inspection constituted conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." The B-vent fireplaces were clearly visible to defendant inspectors at the rough-in inspection. Defendant inspectors knew these units violated the Building Code and approved them nonetheless, without inquiring or investigating whether there was any way that B-vent fireplaces could be converted to direct vent or sealed units, such that they would be Code-compliant and safe in sleeping rooms. Defendant inspectors were aware B-vent fireplaces could not be installed in sleeping areas without posing potentially lethal danger. A reasonable jury could conclude that their conduct demonstrated a substantial lack of concern at the rough inspection stage for plaintiff's own need to comply with the Building Code and also for the health, safety and lives of plaintiff's hotel guests.

Regarding the question of proximate cause, defendant inspector Schwarz testified that Nunnelley was entitled to rely on the approvals at the rough-in inspection in deciding to proceed with the installation and completion of the fireplaces. Nunnelley testified that he would have stopped work had defendant inspectors issued a stop work order at the rough-in inspection to prevent the completion of the fireplace installations that were not code-compliant. A reasonable jury could thus conclude that defendant inspectors' conduct in approving the non-code compliant fireplaces at the rough-in inspection was "the one most immediate, efficient, and direct cause" of plaintiff's damages, to the extent that additional monies were spent on installing and removing the fireplaces. *Robinson, supra,* 462 Mich at 462.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Helene N. White